No. 2803

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
*Appellant,*

vs.

KIMI YAMAMOTO,
*Appellee.*

## BRIEF OF APPELLANT

Upon Appeal From the United States District Court
For the Territory of Hawaii.

JOHN W. PRESTON,
United States Attorney,

CASPER A. ORNBAUN,
Asst. United States Attorney,
*Attorneys for Appellant.*

No. 2803

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
*Appellant,*

vs.

KIMI YAMAMOTO,
*Appellee.*

## BRIEF OF APPELLANT

The facts in this case are practically the same as those in the cases of Sui Joy, Chin Lum and Wong Yuen, now on appeal to this Court.

In this case, as in the other three cases above mentioned, the alien came to the Hawaiian Islands prior to the annexation of those Islands to the United States and now stands charged by the Immigration officials with *practicing prostitution after entry.* (Trans. p. 23.)

To support the charge set out in the warrant of arrest, the Immigration officer presented the statement of Kimi Yamamoto, which is as follows:

"Witness sworn, testifies:
Inspector: Q. What is your name?

Witness—A. Kimi Yamamoto.

Q. How old are you? A. 35.

Q. Where were you born?

A. Nakajima Mura, Niigate Ken, Japan.

Q. When did you first come to Hawaii?

A. Fifteen years ago.

Q. What boat did you come on?

A. Gaelic.

Q. What month? A. October.

Q. Did you come alone?

A. With my husband.

Q. What is his name?

A. Jiunsaku Hirosake.

A. Are you still married to him?

A. I am divorced from him

Q. Where is he now? A. In Japan.

Q. When did he go to Japan?

A. Ten years ago.

Q. Have you married again? A. No.

Q. Have you been living with a man named Okasaki? A. No.

Q. Since you and your husband separated have you had a sweetheart or paramour?

A. No.

Q. Sure of that, are you? A. Yes.

Q. Been living all by yourself all this time?

A. Yes.

Q. What have you been doing for a living?

A. Practicing prostitution.

Q. When did you begin to practice prostitution?

A. Eleven years ago, but not continually, sometimes stop several months.

Q. When was the last time you practiced prostitution?

A. Three months before you made the big raid.

Q. Why did you stop at that time?

A. I was suffering from eye trouble and I was under doctor's care. I heard that you were going to arrest and send prostitutes back to their own country so I stopped.

Q. What have you been doing since you stopped practicing prostitution?

A. I have nothing to do yet because my eyes are not well yet.

Q. What kind of sickness did you have in your eyes?

A. Trachoma and my eyesight is getting dull.

Q. Are you sure that you have not had a sweetheart or paramour? A. No, I have none.

Q. Are you saving your money all for yourself?

A. Well, I saved some money but sent some to Japan to my elder sister and my mother.

Q. Any further statement you wish to make? A. No.

(Notes signed by witness in Japanese only.)
Copy of Japanese characters:

(Signature) KIMI YAMAMOTO.

November 17, 1913.

Certified Correct:

(Sgd.) MAURICE SPALDING,
(Stenographer.)"

To save confusion as to the time that said alien came to the Hawaiian Islands, it was stipulated by counsel that the said Kimi Yamamoto had been a resident of the Hawaiian Islands for "more than five years prior to the 15th day of June, A. D. 1900." The annexation of the Hawaiian Islands took place August 12, 1898.

**Questions Determined by the United States District Court in Rendering Its Decision in This Case.**

In determining the question in this case as to whether or not the said Kimi Yamamoto was being wrongfully restrained of her liberty, the Court was governed by the same principles of law that caused his Honor to grant writs in the three other cases referred to herein and which are now also on appeal in the above entitled Court.

The decision in this case seems to adopt the same wording in the decisions governing the other three cases above referred to and since the questions involved in this case arose in the other three cases referred to and were determined by the Court in rendering his decision in those cases, the appellant now desires to direct attention to the lower Court's decision, which reads as follows:

> "An alien who came to the Hawaiian Islands previous to their annexation to the United States, and was living there at the time of such annexation, cannot be said to 'have entered the United States' within the meaning of Section 3 of the Act of February 20, 1907, as amended by the Act of March 26, 1910, 36 Stat. 263.

*Same—Same—Same—Actual Landing Subject to Statutory Conditions:* The provisions of the said statute for the deportation of aliens found 'to be unlawfully within the United States,' presume an actual landing of such aliens, subject to the conditions as to conduct set forth in the statute.

In the first three of the above cases (referring to Wong Yuen, Chin Lum and Kimi Yamamoto) demurrers to the petitions were overruled, whereupon the respondent filed his returns which were demurred to by the petitioners, the fifth ground of demurrer being as follows: 'That it does not appear in the said return that the said Sui Joy is an alien who has ever entered the United States within the meaning of the law herein provided.' In the fourth case, the petitioner filed a traverse to the return of the respondent, in which, among other things, she raised the same point as raised on the fifth ground of the said demurrers, to-wit, that she was not subject to the immigration laws of the United States, having come to the Hawaiian Islands while they were under the jurisdiction of the Republic of Hawaii.

The argument on this point is, briefly, that the petitioners, having come to the Hawaiian Islands previous to annexation, as alleged, and being domiciled residents here at the time of annexation, the statute does not apply to them, such persons although aliens, not having 'entered' the United States.

The following is the immigration rule applying to these cases:

'The application must state facts bringing the alien within one or more of the classes subject to deportation after entry. The proof of

these facts should be the best that can be obtained. The application must be accompanied by a certificate of landing (to be obtained from the immigration officer in charge at the port where landing occurred), or a reason given for its absence, in which case effort should be made to supply the principal items of information mentioned in the blank form provided for such certificates. Telegraphic application may be resorted to only in case of necessity and must state (1) that the usual written application has been made and forwarded by mail, and (2) the substance of the facts and proof therein contained.' Immigration Rule 22, subdivision 2.

The statute under which the petitioners are held is a part of Section 3 of the Act of February 20, 1907, as amended by the Act of March 26, 1910, 36 Stat. 263. It is as follows:

'Any alien who shall be found an inmate of or connected with the management of a house of prostitution or practicing prostitution *after such alien shall have entered the United States,* or who shall receive, share in, or derive benefit from any part of the earnings of any prostitute, or who is employed by, in, or in connection with any house of prostitution or music or dance hall or other place of amusement or resort habitually frequented by prostitutes, or where prostitutes gather, or who in any way assists, protects, or promises to protect from arrest any prostitute, shall be deemed to be unlawfully within the United States and shall be deported in the manner provided by Sections 20 and 21 of this Act.'

The demurrers are allowed on the fifth ground. It is obvious from a reading of division 2 of Immigration Rule 22, above quoted, that the Commissioner General of Immigration

and the Secretary of Labor, who are authorized by the Immigration Act of February 20, 1907, 34 Stat. 898, Sec. 22, to establish rules for carrying out the provisions of the Act, have construed the Act on the point referred to, as meaning an actual entry or landing in the United States. The said division 2 of the 22d rule, in providing for an application by the immigration officers to the Secretary of Labor for authority to arrest an alien suspected of being unlawfully in the United States, requires, among other things, that the application 'shall be accompanied by a certificate of landing (to be obtained from the immigration officer in charge at the port where the landing occurred), or a reason given for its absence.' Of course, this can refer to nothing else than an actual landing in the United States. This construction is rendered still more positive by the 'certificate of landing,' required by the rule to accompany the application. The blank form provided by the Secretary of Labor and the Commissioner General of Immigration under the authority of the statute, is as follows: 'Form 564.

Certificate as to landing of Alien
(To accompany application for warrant of arrest).

**Department of Commerce and Labor.**

Immigration Service.

.....190.....

I hereby certify that I have examined the records of the immigrant station at..... with reference to the record of the landing or entry of ....., an alien, and that the following facts relative to such landing or entry are disclosed by said records.

(1) Name of alien,.....; age,.....; sex,.....

(2) Race,.....; country whence alien came, .....

(3) Exact date and port of arrival in the United States,.....

(4) Name of vessel and line,.....
(If alien arrived via Canada or Mexico, so state.)

(5) Destination,.....

(6) Occupation,.....; money brought, $.....

(7) By whom passage paid,.....

(8) Whether ever in United States before, .....

(9) Whether inspected at time of arrival, .....

.....

(If held for special inquiry, so state.)

Remarks: .....

.....

(Signature) .....
(Official title) .....'

Such construction, being authoritative and official, is entitled to great weight. Endlich's Interpretation of Statutes, Sec. 357.

Counsel in the Sui Joy, Ching Lum and Wong Yuen cases, set forth somewhat exhaustively the constitutional argument that Congress derived its power to legislate as to immigrant aliens after being admitted, solely from section 8 of the first article of the Constitution of the United States, which gives it the power 'to regulate commerce with foreign nations.' Quoting from the brief, 'the theory is that commerce with foreign nations includes not only an exchange of commodities, but also the importation or incoming of passengers. The

proposition that Congress has no power to regulate the affairs of individual persons in the United States except as incidental to some one of the powers expressly given to it by the Constitution, is fundamental ' It follows, therefore, that whereas Congress may permit an alien immigrant to land under certain conditions as to conduct thereafter while in the country, involving forcible deportation upon his failure to conform to such conditions, it may not deport alien residents for similar conduct, with whom there has been no such conditional entry into the United States. In other words, an alien resident of the United States in regard to whom there was no condition as to his conduct during his residence, that was made the basis of his landing or entry into the country by a then existing statute, is not within the scope of Section 3 of the Immigration Act of February 20, 1907, as amended by the Act of March 26, 1910. Plainly the law does not affect persons who have not *entered* the United States previous to doing the acts charged. These petitioners all claim to have been living in Hawaii before and at the time of annexation. In matters of immigration the word *enter* has not acquired a technical meaning. It would appear that these cases might well have been disposed of on their inception, on the ground that the statute is too clear to require interpretation.

*Absoluta sententia expositore indiget.'* Potter's Dwarris, 128; Vattel's first rule *id.* 126.

As the ruling on this ground of the demurrer disposes of the cases, the Court need not consider the other grounds.

It is not clear whether there remains a question of fact to be decided. The returns in the first three cases do not specifically deny the

allegations of residence in Hawaii before annexation, but make a general denial of all further allegations and averments of said petitions necessary to be denied. The return in the fourth case accepts the allegation of the petition in that case that the petitioner arrived in Hawaii in the year 1897, as correct. She (Kimi Yamamoto) is, therefore, under the foregoing conclusions, entitled to her discharge under the writ, which is hereby ordered.

If the respondent desires to contest the allegations of residence in Hawaii, in the three first cases, an opportunity will be given, otherwise such petitioners will be discharged.

(Sgd.) SANFORD B. DOLE,
Judge of the United States District Court for the Territory of Hawaii."

**Supplementary Decision.**

On the afternoon of the day the foregoing decision was given in open court, counsel on both sides filed the following stipulation:

'It is hereby stipulated and agreed by and between the United States of America through J. W. Thompson, its Assistant District Attorney of the District and Territory of Hawaii, and Sui Joy, Ching Lum and Wong Yuen, by their attorneys, Thompson & Milverton, that each of said petitioners were residents of the Hawaiian Islands for a period of more than five (5) years prior to the 15th day of June, A. D. 1900.'

By this stipulation it would appear that the said petitioners were resident here for over three years before the annexation of Hawaii to the United States, which took place August 12, 1898. The Court was thereupon prepared to order the discharge of the petitioners, accord-

ing to the conclusions of the foregoing decision, but before such order was effectuated the Assistant District Attorney, acting for the respondent, moved the Court for an opportunity of showing that the petitioners severally visited China after annexation and returned again to Hawaii.

Such motion must be denied, inasmuch as the cases contain no pleadings which would form a basis for such testimony,—as there is no showing that such information is newly discovered and as such information, if it exists, obviously has been, during the pendency of these proceedings, within the reach of the respondent.

The writs are made absolute and the petitioners discharged.

Honolulu, T. H., August 4, 1915.

(Sgd.) SANFORD B. DOLE,
Judge of the United States District Court for the Territory of Hawaii."

**Argument.**

From a reading of the foregoing, it can readily be seen that the only difference between this case and the other three cases to which the Court's attention has been so frequently called is this: Kimi Yamamoto, the appellee in the above entitled cause, was arrested upon a charge of *practicing prostitution after entry into the United States*, while in the other three cases, the said aliens were also charged with receiving, sharing in, and deriving benefit from the earnings of prostitutes. Therefore, the principal question involved in this case is whether or not the said appellee entered the United States,

within the meaning of the Immigration Act of February 20, 1907, as amended by the Acts of March 26, 1910, and March 4, 1913.

It does not seem reasonable that Congress would enact a law giving certain aliens rights and denying those same rights to other aliens when no real cause for such discrimination exists. In other words, why should Congress enact a law which would permit aliens who perchanced to be residents of the Hawaiian Islands prior to August 12, 1898 (date of annexation to the United States) and at the same time deprive aliens of those rights who entered those Hawaiian Islands subsequent to this date?

The charge against the appellee is one of the most serious charges provided for in the Immigration Act, and as evidence of this, it will be noted that an alien who is found practicing prostitution may be arrested and deported at any time while the deportation of other aliens must come within the three years' period, as provided for in Sections 20 and 21 of said Immigration Act (*Zakonaite* vs. *Wolf,* 226 U. S. 272; *Bugazurtz* vs. *Adams,* 228 U. S. 584).

The only reasonable interpretation that can be placed upon Section 3 of the Immigration Act, which refers to the particular charge against appellee, is that said appellee entered the United States at the same time that the Hawaiian Islands entered the United States.

Consequently, and in conclusion, the government's position, briefly stated, is this: That inasmuch as appellee has admitted that she practiced prostitution since the Hawaiian Islands have become a part of the United States, and since she entered the United States, as provided for in Section 3 of said Immigration Act, at the same time that the Hawaiian Islands entered the United States, she was properly within the jurisdiction of the Immigration officials, and the lower Court erred in holding that an alien who came to the Hawaiian Islands previous to said annexation and who was living there at the time of said annexation, can not be said to have entered the United States within the meaning of Section 3 of the Act of February 20, 1907, as amended by the Act of March 26, 1910, and therefore not subject to deportation.

Respectfully submitted,

CASPER A. ORNBAUN,
*United States Attorney,*

JOHN W. PRESTON,
*Asst. United States Attorney,*

*Attorneys for Appellant.*